

Oct 23, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARCUS KIMM,

Plaintiff,

v.

AEROTEK, INC., a Maryland corporation,

Defendant.

NO. 2:17-cv-00221-SAB

**ORDER DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court is Defendant's Motion for Summary Judgment, ECF No. 41. A hearing on the motion was held on October 17, 2018, in Spokane, Washington. Plaintiff was represented by Matthew Z. Crotty. Defendant was represented by Kellie A. Tabor.

Introduction

Plaintiff is a member of the Washington Air National Guard, who has been on numerous tours of duty in Afghanistan and the Middle East. Defendant Aerotek, Inc. is a recruiting firm. Defendant contacted Plaintiff to see if he wanted to work for Transtector, a local company. Transtector had a position open for Lead RF-Technician. Plaintiff maintains that when Defendant learned of his impending combat deployment with the National Guard he was screened out of the applicant pool for the Transtector job.

Plaintiff brought suit against Defendant under the Uniformed Services

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 1**

1 Employment and Reemployment Rights Act of 1994 (USERRA), alleging
2 discrimination in violation of 38 U.S.C. § 4311(c)(1), and veterans discrimination,
3 in violation of the Washington Law Against Discrimination, Wash. Rev. Code §§
4 49.60.030, 49.60.180 & 49.60.200 (WLAD). Plaintiff is seeking liquidated
5 damages, alleging that Defendant knew or showed reckless disregard for whether
6 its conduct was prohibited under the USERRA. He is also seeking attorneys' fees
7 and expert costs, pursuant to 38 U.S.C. § 43.23, and the WLAD.

8 Defendant now moves for summary judgment.

9 **Motion Standard**

10 A motion for summary judgment shall be granted when there is no genuine
11 issue as to any material fact and the moving party is entitled to judgment as a
12 matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
13 247-48 (1986). The moving party must show that "under the governing law, there
14 can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250.

15 Generally, the burden is on the moving party to demonstrate that it is entitled
16 to summary judgment. *Id.* at 256-57. The moving party bears the initial burden of
17 identifying the elements of the claim or defense and evidence that it believes
18 demonstrates the absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477
19 U.S. 317, 323 (1986). When the non-moving party has the burden at trial, however,
20 the moving party need not produce evidence negating or disproving every essential
21 element of the non-moving party's case. *Celotex*, 477 U.S. at 325. Instead, the
22 moving party's burden is met by pointing out an absence of evidence supporting
23 the non-moving party's case. *Id.* The burden then shifts to the non-moving party to
24 show that there is a genuine issue of material fact that must be resolved at trial.
25 Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 256.

26 A genuine issue of material fact exists "if the evidence is such that a
27 reasonable jury could return a verdict for the non-moving party." *Anderson*, 477
28 U.S. at 248. In ruling on a motion for summary judgment, the Court construes the

1 evidence in the light most favorable to the non-moving party. *Scott v. Harris*, 550
2 U.S. 372, 378 (2007).

3 **Background Facts**

4 The following facts are set forth in the light most favorable to Plaintiff, the
5 non-moving party.

6 Lindsey Lee, an employee for Defendant, reached out to Plaintiff by email
7 on March 31, 2017, at 10:50 a.m.:

8 Hello Marcus,

9 My name is Lindsey Lee and I work for Aerotek here in Spokane.

10 The reason for my email is that I came across your information in our
11 system and am interested in some of your skill sets/experience you
12 have. Not sure if you are currently working, but I would be interested
13 in speaking to you more about our current openings we have. If you
14 are not currently looking for work, please still reach out to me as I
15 could be a resource for you in the future.

16 Thank you!

17 Lindsey

18 Ms. Lee also called Plaintiff, leaving him a voicemail letting him know she
19 was reaching out to him about a possible position. Plaintiff returned the call a few
20 minutes later and spoke to Ms. Lee. Ms. Lee reiterated that she had reviewed
21 Plaintiff's resume and the skills he listed appeared to match the RF Tech position
22 for which Aerotek as recruiting. Plaintiff indicated he was not interested in the
23 position as he was only looking for temporary work. He then emailed her back
24 shortly after the telephone conversation:

25 Good afternoon,

26 After our conversation earlier, I would like to reconsider the offer
27 and apply for the position you were offering. I would like to be
28 considered as you wouldn't have contacted me if I didn't have the
skills and would be a good fit.

Ms. Lee set up an interview for Monday, April 3. She met with Plaintiff for
about 30 minutes. After they spoke about the job description and responsibilities,

1 Plaintiff informed Ms. Lee that he was scheduled for a military deployment in a
2 few months. After he did that, the interview slowed down and ended. Ms. Lee's
3 demeanor changed from "bubbly" and "excited to . . . go over the position" to
4 being "withdrawn" and not as "interactive" once he mentioned his upcoming
5 military deployment.

6 After the interview ended, Ms. Lee marked "Y" for yes to allow Plaintiff to
7 proceed through the hiring process. At 4:33 p.m., Ms. Lee emailed Plaintiff about
8 his deployment:

9 Hello Marcus,
10 I just remembered that when we last spoke you said you had an
11 appointment that began in June? Is that still accurate?
12 Thank you
Lindsey

13 At 4:42 p.m., Plaintiff responded:

14 A deployment mid-July.

15 At 4:44 p.m., Ms. Lee replied:

16 Ok. This position would be longer term, hoping for someone to stick
17 around fulltime.

18 At 4:47 p.m., Plaintiff responded;

19 I would come back as soon as I come back from the deployment. I am
20 looking for a full time career, not something temporary.

21 At 4:50 p.m., Ms. Lee replied:

22 How long do you anticipate the deployment being? I will get your
23 resume over to them tomorrow.

24 At 4:56 p.m., Plaintiff responded:

25 My orders go until February, but it is only a 6 month deployment and
26 they said we would likely get back mid-late January.

27 The next day, April 4, at 11:53 a.m., Ms. Lee wrote:

1 Ok. They are hoping for a candidate that would be there to fulfill the
2 whole 6 month contract to hire. I will keep you in mind for other
3 opportunities that may be before you leave. But, please get in contact
4 when you get back, so we can discuss options then.

4 Thank you,
5 Lindsey

6 Shortly thereafter, at 12:05 p.m., Plaintiff wrote back:

7 Am I not being considered because of the deployment in July?

8 After receiving that email, Ms. Lee indicates that she tried calling Plaintiff
9 several times, with no luck. She left a voicemail and also sent an email at 12:41
10 p.m.:

11 Give me a call when you can so we can discuss.
12 I just left you a voicemail.

13 Plaintiff then wrote back at 1:42 p.m.:

14 I tried calling, but I got the voicemail. I didn't leave one. Email
15 should be fine since I can get back to you faster. I'm not always busy,
16 but am currently in the middle of something.
17 If I didn't have the deployment, would I still be considered? Like, if I
18 could work something out to deploy later in the year (I don't know if
19 it's an option), could I still be considered? I'm looking for a career
20 that I can come back to so I can support my family. I know I'd be a
21 good fit for this position.

22 It does not appear that Plaintiff and Ms. Lee had any further
23 communications, except at 4:56 p.m., Ms. Lee emailed Plaintiff:

24 If you can please send those references tonight, I will call them
25 tomorrow & submit your resume!

26 Plaintiff quickly responded and provided the two references. Ms. Lee
27 acknowledge receipt of the email. She told him she would call the
28 references, although she never did. Plaintiff was never told that if he failed

1 to supply his references to Aerotek by a date certain, he would forfeit his
2 opportunity to compete for the RF Technician position.

3 On April 4 in the afternoon, Ms. Lee interviewed Harlan Kamm for
4 the RF tech position. Following up on the interview, Ms. Lee sent Mr.
5 Kamm an email:

6 Can you please send over 2 professional references? I am working on
7 updating your resume and sending it here soon.”

8 Ms. Lee began the reference checks for Mr. Kamm after Mr. Kamm
9 provided her with the references.¹

10 At 4:23 p.m., Ms. Lee sent the following email to Philip MacArthur, who is
11 her boss and who would make the ultimate recommendation to Transtector:

12 Harlan has over 12 years of R & D Technician/Sustaining Test
13 Engineer experience with Itron. While there he performed various
14 tasks, i.e. troubleshooting and fixing issues down to the component
15 level, testing & validating circuit boards using test equipment, helped
16 develop new and existing products and soldering. Harlan gained a lot
17 of experience in RF technician duties at Itron. Prior to that, he
18 worked at Itronix where he assembled and repaired computers &
19 laptops. Harlan is interested in getting back into the RF Technician
20 field and gain a position at Transtector. He prefers swing shift, but is
21 very open to any other shift that is available. He has open availability
22 for an interview.

23 Mr. MacArthur sent Transtector an email regarding Mr. Kamm at 4:32 p.m.
24 Transtector accepted the application on April 5 and Mr. Kamm entered into an
25 employment contract with Defendant that same day, which he electronically signed
26 around 5:43 p.m.

27 ¹ The parties disagree about the significance of Defendant’s notations, which
28 indicate that Ms. Lee completed a reference check on the 4th, and a second
reference check on the 17th.

1 An interview was set up with Transtector. On April 7, 2017, Ms. Lee sent an
2 email to Mr. Kamm, giving him some pointers regarding the interview. Mr. Kamm
3 reported back that the interview did not go as well as he expected and he wasn't
4 sure he had the knowledge for the position. Regardless, Transtector indicated they
5 would hire Mr. Kamm and he began working at Transtector.

6 Analysis

7 Plaintiff is asserting two claims: (1) Failure to Hire, Discrimination under
8 the Uniformed Services Employment and Reemployment Rights Act of 1994
9 (USERRA); and (2) violation of the Washington Law Against Discrimination. He
10 is also seeking liquidated damages under the USERRA.

11 Defendant argues summary judgment is appropriate on both these claims
12 because (1) Plaintiff's deployment was not a motivating factor in Aerotek's
13 decision not to hire him; and (2) even if Aerotek's decision not to hire Plaintiff
14 was motivated by his deployment, Aerotek would have made the same decision in
15 the absence of that deployment.

16 A. USERRA Discrimination Claim

17 USERRA prohibits discrimination against persons because of their service in
18 the uniformed services. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir.
19 2002) (citation omitted). "The purpose of USERRA is to encourage non-career
20 military service, minimize disruption based on this service, and prevent
21 discrimination against service members." 38 U.S.C. § 4301; *Vega-Colón v. Wyeth*
22 *Pharm.*, 625 F.3d 22, 25 (9th Cir. 2010).

23 38 U.S.C. § 4311(b) provides:

24 (a) A person who is a member of, applies to be a member of, performs,
25 has performed, applies to perform, or has an obligation to perform
26 service in a uniformed service shall not be denied initial employment,
27 reemployment, retention in employment, promotion, or any benefit of
28 employment by an employer on the basis of that membership,
application for membership, performance of service, application for
service, or obligation.

1 A violation of USERRA occurs when a person's membership, application
2 for membership, service, application for service, or obligation for service in the
3 uniformed services is a motivating factor in the employer's action, unless the
4 employer can prove that the action would have been taken in the absence of such
5 membership, application for membership, service, application for service, or
6 obligation for service. 38 U.S.C. § 4311(c)(1); *see also Leisek*, 278 F.3d at 900
7 (citation omitted). Thus, by its own terms, USERRA requires only that military
8 status be a "motivating factor in the adverse employment decision. *Leisek*, 278
9 F.3d at 900.

10 **B. Washington Law Against Discrimination**

11 The Washington Law Against Discrimination (WLAD) provides:

12 (1) The right to be free from discrimination because of race, creed,
13 color, national origin, sex, honorably discharged veteran or military
14 status, sexual orientation, or the presence of any sensory, mental, or
15 physical disability or the use of a trained dog guide or service animal
16 by a person with a disability is recognized as and declared to be a civil
17 right. This right shall include, but not be limited to: (a) The right to
18 obtain and hold employment without discrimination.

19 Wash. Rev. Code § 49.60.030.

20 Disparate treatment occurs when an employer treats some people less
21 favorably than others because of race, color, religion, sex, or other protected status.
22 *Hegwine v. Longview Fibre Co., Inc.*, 162 Wash.2d 340, 354 n. 7 (2007).

23 **C. Application**

24 Here, direct and circumstantial evidence exists for a reasonable jury to find
25 that Plaintiff's upcoming deployment was a motivating factor in not furthering
26 Plaintiff's employment with Transtector. While Defendant argues it would have
27 made the same decision regardless, it is for the jury to decide whether that is true.
28 As such, summary judgment is not appropriate.

Accordingly, **IT IS ORDERED:**

1 1. Defendant's Motion for Summary Judgment, ECF No. 41, is
2 **DENIED.**

3 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
4 this Order and to provide copies to counsel.

5 **DATED** this 23rd day of October 2018.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian
United States District Judge